In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1107

JOSEPH RIZZO AND ROSE RIZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1963 the United States instituted this civil action against, *inter alia*, Joseph Rizzo and his two partners in General Equipment Company in a federal district court to foreclose its federal tax liens for unpaid withholding, F.I.C.A. and F.U.T.A. taxes, with penalties and interest, incurred by the partnership. In January 1964, the district court appointed a receiver to preserve the partnership assets. In May 1965, Mr. Rizzo filed a motion with the district

court to set aside the appointment of the receiver. (Pet. 32, 34.) On June 16, 1965, the district court ordered Mr. Rizzo's motion stricken on the grounds that the paper filed was not one provided for by Rule 7 of the Federal Rules of Civil Procedure and, further, that it contained immaterial and scandalous matter (Pet. 28). Mr. Rizzo's motion to set aside this order was denied by the district court on September 17, 1965 (Pet. 29).

Petitioners filed a notice of appeal on November 16, 1965 (Pet. 35), and the record was received by the clerk of the court of appeals before December 20, 1965 (Appendix, *infra*, pp. 5-6). But petitioners failed to docket their appeal, and on July 1, 1966, the United States filed a motion to docket and dismiss the appeal, which was granted by the court of appeals on October 21, 1966 (Pet. 30, 33). Mr. Rizzo's petition for rehearing was denied by the court of appeals on December 1, 1966 (Pet. 31).

The sole issue before this Court is whether the court of appeals abused its discretion in dismissing petitioners' appeal for failure to docket the case. The issue is not a substantial one and, in our view, warrants no further review.

Rule 73(g) of the Federal Rules of Civil Procedure provides for the docketing of an appeal within 40 days from the date of filing of the notice of appeal, unless an extension of time for docketing is granted by the court upon a showing by the appellant that his inability to effect timely docketing was due to reasonable cause or excusable neglect. And Rule 73(a) provides that an appellant's failure to take any

step beyond timely filing of a notice of appeal is a ground for such action as the court of appeals considers appropriate, including dismissal of the appeal. The dismissal of an appeal pursuant to this provision is a matter for the sound discretion of the appellate court. See *Pyramid Motor Corp.* v. *Ispass*, 330 U.S. 695, 704-705; 7 Moore, *Federal Practice* (2d ed., 1966), §§ 73.11, 73.29, pp. 3204-3207, 3259-3263; 3A Barron and Holtzoff, *Federal Practice and Procedure* (1958), §§ 1559-1560, pp. 89-95.

Petitioners here filed a notice of appeal on November 16, 1965. The correspondence of the clerk of the Sixth Circuit, set forth in the Appendix, *infra*, pp. 6-9, shows that he advised Mr. Rizzo on December 20, 1965, that the filing fee would have to be paid, and the record docketed, before December 26, 1965, and furthermore, that repeatedly thereafter—on December 27, 1965, March 28, 1966, and June 23, 1966—the clerk advised Mr. Rizzo of his failure to docket the appeal. Nevertheless, petitioners never docketed their appeal. There is nothing in the record to indicate that petitioners filed timely motions for extensions of time to docket their appeal or that they sought to proceed *in forma pauperis*. Nor have petitioners suggested or shown that they have been unable to comply with the docketing requirements, or that they had any legitimate reason for their failure to docket.

In these circumstances, the court of appeals did not abuse its discretion in dismissing the petitioners' appeal.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

KARL SCHMEIDLER,
Attorney.

MARCH 1967.

APPENDIX

UNITED STATES DISTRICT COURT
Office of the Clerk
Northern District of Ohio
Cleveland, Ohio 44114

C. B. Watkins, Clerk

December 17, 1965

Carl W. Reuss, Clerk
United States Court of Appeals
New Federal Bldg.
Cincinnati, Ohio 45202

Re: U.S.A. vs. Joseph Rizzo, et al. Civil Action Number C 63—909.

Dear Mr. Reuss:

There are enclosed the certified original papers and two copies of the docket entries showing the numbers assigned to such papers in the above entitled case.

Very truly yours,

C. B. WATKINS, Clerk

/s/ J. A. Green
J. A. GREEN,
Chief Deputy Clerk

JAG:wmj
Enc.
cc: Joseph Rizzo, PP
51 East 99th St.
Cleveland, Ohio

Merle M. McCurdy
400 Federal Bldg.
Cleveland, Ohio 44114

December 20, 1965

Mr. Joseph Rizzo
51 East 99th Street
Cleveland, Ohio

Re: United States of America vs. Joseph Rizzo, et al (D. C. No. C63-909, Civil)

Dear Sir:

We have received the certified record on appeal in the above-entitled case.

Please forward by return mail, or wire, the filing fee of $25.00 required by the rules of this Court so that the record can be filed and the appeal docketed before the expiration date which is December 26, 1965.

Yours very truly,

CARL W. REUSS, Clerk

Deputy Clerk

December 27, 1965

Mr. Joseph A. Rizzo
51 E. 99th Street
Cleveland, Ohio

Dear Sir:

We are returning your check dated December 22, 1965. The amount shown in figures is the correct amount, $25.00. However, the amount shown in writing is "twenty dollars". Please send us a proper check in the amount of $25.00.

Yours very truly,

CARL W. REUSS, Clerk

CWR:mml
Encl.

March 28, 1966

Mr. J. Rizzo
51 E. 99th St.
Cleveland, Ohio

Dear Sir:

The rules of this court are printed and distributed by Gates Legal Publishing Company, 1380 Dodge Court, Cleveland, Ohio. I understand that they charge $1.00 for each copy of the rules.

At the present time you have no appeal on the docket of this court. Please refer to my letter of December 27, 1965, in which I returned your check for $20.00. The filing fee in this court is $25.00 and your case cannot be docketed until we receive a proper check or money order in that amount.

Yours very truly,

CARL W. REUSS, Clerk

CWR:HT

June 23, 1966

Mr. Joseph Rizzo
51 E. 99th St.
Cleveland, Ohio

Re: United States of America vs. Joseph Rizzo, et al (D. C. No. C63-909, Civil)

Dear Sir:

Please refer to our letters to you dated December 20, 1965, December 27, 1965, and March 28, 1966. We have never received from you the filing fee of $25.00 which is required by the Rules of this Court before your appeal can be filed and docketed. If you intend to go ahead with this case will you please forward a money order for $25.00. If you have decided not to proceed with the appeal will you please so advise me by return mail.

Yours very truly,

CARL W. REUSS, Clerk

CWR:mml

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